(25,100)

20772

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 358.

A. C. STELLWAGEN, TRUSTEE FOR MARGARET ZENGERLE,

vs.

ALFRED CLUM, TRUSTEE IN BANKRUPTCY OF THE GEORGIAN BAY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1916.

1 Filed Nov. 7, 1914. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2448.

A. C. STELLWAGEN, Trustee for Margaret Zengerle, Appellant,

v.

ALFRED CLUM, Trustee in Bankruptcy of The Georgian Bay Company, Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio.

Certificate Submitting Certain Questions of Law to the Supreme Court.

Appellant filed a petition below for an order to compel surrender and transfer to him of certain white pine lumber and balance due upon a particular open account then in possession of appellee as trustee in bankruptcy for the Georgian Bay Company. The order was denied, the petition dismissed, and appeal taken.

One of the questions arising on the hearing of this cause was, whether the Bankruptcy Act operated to suspend certain statutory provisions of Ohio; and for the proper decision of that question, this court desires the instruction of the Supreme Court. The facts upon which the question arises are as follows:

The Georgian Bay Company, an Ohio corporation, was at the time of the transactions in dispute engaged in the wholesale and retail lumber business at Cleveland, Ohio. February 2, 1910, the company delivered to appellant's predeccessor (A. L. McBean), as trustee for Margaret Zengerle and the Dime Savings Bank of Detroit, its bill of sale, describing 433,500 feet of white pine lumber then in the company's yards, and stating a total price of $14,013; crediting the trustee with certain promissory notes of the company for a like sum and payable in different amounts, to the order of Margaret Zengerle, C. M. Zengerle, agent, and the Dime Savings Bank, respectively. Neither the bill of sale nor a copy was filed with the recorder of Cuyahoga County, Ohio; but the lumber so in terms sold consisted of piles (stacked in the ordinary way) which
2 were to be and at the time in fact were each distinctly marked: "Sold to A. L. McB., Agt." May 3, 1910, the company with consent of McBean sold this lumber and certain of it own lumber then in the yards, to Schuette & Co. of Pittsburgh. Payment was to be made by Schuette & Co., part in cash, part in notes maturing at fixed times between date of sale and the following September 10th, and the balance in cash on or before October 1st. Two days later, May 5th, the Georgian Bay Company trans-

ferred to appellant "the balance, twenty-five per cent. of invoice value or what may show due on the first of October, A. D. 1910, of the purchase price of the lumber" (so sold to Schuette & Co.), to secure payment in full of all moneys that should be advanced by, and "payment *pro rata* of all moneys" then owing to, the Dime Savings Banks, Mrs. Zengerle and C. M. Zengerle, agent; and any surplus remaining was to be returned to the company. Schuette & Co., while owing a balance of $7,500 on portions of the lumber it had received, rejected the rest; this can be identified and is worth about $4,000. It was the transfer of this balance and the surrender of this rejected lumber that appellant sought in the court below.

October 31, 1910, the Georgian Bay Company made a general assignment for the benefit of its creditors, which was properly filed the following November 7th; and on the 9th of that month the company was adjudicated a bankrupt. At the time there remained due from the bankrupt to Mrs. Zengerle $7,100. C. M. Zengerle is the husband of Margaret Zengerle, and was the president of the Georgian Bay Company; the notes payable to his wife represented loans of money belonging to her; and in negotiating those loans and in the transaction had under the bill of sale, he acted as her agent and as president of the company. The theory of the court below was that the bill of sale (February 2, 1910) was intended merely as security and, not having been deposited in accordance with Sec. 4150 (2 Bates' Ann. Ohio Stat., p. 2302) concerning chattel mortgages, was null and void; that the transfer (May 5th) of balance accruing October 1st from Schuette & Co. was made with intent to hinder and delay creditors, when, according to the laws and the rule of judicial decision of the State of Ohio, the Georgian Bay Company was insolvent, though not according to the Bankruptcy Act; that Margaret Zengerle was, through her agent, C. M. Zengerle, chargeable with knowledge of such intent and insolvency, and the Savings Bank was not; that as to Margaret Zengerle the
3 transfer was null and void and so was set aside, but that the Savings Bank was entitled to be paid out of the balance of the Schuette account. No appeal was taken from the portion of the decree which allowed recovery by the Savings Bank.

State statutes claimed to be suspended by the Bankruptcy Act.—The Ohio statutory provisions in force at the date of the bill of sale (February 2, 1910) and in terms vesting rights, if any existed, in the general creditors to have that instrument set aside, were sections 6343 and 6344 of the Revised Statutes, as amended April 30, 1908 (99 Ohio Laws, 241, 242). These sections were each separated and their phraseology was rearranged, though without apparent change in effect, by the General Code of Ohio, approved February 15, 1910 (3 General Code of Ohio, pp. 2392, 2393 and 2982), where they appear as sections 11102, 11103, 11104, 11105, 11106 and 11107 (see also 5 Page & Adams Ann. Ohio Gen. Code, pp. 449, 460, 461 472); and although the transfer of account was made May 5, 1910, we think it sufficient to set out section 6343 in whole, and section 6344 in material parts (as the sections stood February 2, 1910)

in the margin.[1] The specific claim is that section 6343, when con-
4 sidered in connection with the chapter concerning in-
solvent debtors (of which the section forms a part), is suspended by the Bankruptcy Act. We take it that counsel's main re-

[1] "Sec. 6343. Every sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency, and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors, and in any suit brought by any creditor or creditors of such debtor or debtors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured.

"Provided, however, that the provisions of this section shall not apply unless the person, or persons to whom such sale, conveyance, transfer, mortgage or assignment be made, knew of such fraudulent intent on the part of such debtor or debtors, and provided, further, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if such mortgage be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where, upon foreclosure or taking possession of such property, the mortgagee fully accounts for the proceeds of such property.

"Every sale or transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferrer's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay or defraud creditors within the meaning of this section, unless the seller or transferrer shall, not less than seven (7) days previous to the transfer of the stock of goods sold or intended to be sold, and the payment of the money thereof, cause to be recorded in the office of the county recorder of the county in which such seller or transferrer conducts his business, and in the office of the county recorder of the county or counties in which such goods are located, a notice of his intention to make such sale or transfer, which notice shall be in writing describing in general terms the property to be sold and all conditions of such sale and the parties thereto; excepting, however, that no such presumption shall arise because of the failure to record notice as above provided in the case of any sale or transfer made under the

liance, although not distinctly stated, is grounded upon that portion of section 6343 which provides:

"a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

It is worthy of observation that section 6343 was amended shortly before the passage of the Bankruptcy Act, to-wit, April 26, 1898 (93 Ohio Laws, 290); another amendment was made May 12, 1902 (95 Ohio Laws, 608) but it is not important. By the amendment of 1898 it was provided that a sale, etc., whether made in trust or otherwise, with design to prefer one or more creditors to the exclusion of others or with intent to hinder, delay or defraud creditors, should be declared void as to creditors at the suit of any creditor, and should

"operate as an assignment and transfer of all the property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

No legislation going this far was ever before enacted in the state; whether the change made in this provision by the amendment of section 6343 on April 30, 1908, before quoted, was intended as a modification or not, does not appear; but it is not perceivable that

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direction or order of a court of competent jurisdiction, or by an executor, administrator, guardian, receiver, assignee for the benefit of creditors or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law, nor in the case of any sale or transfer of any property exempt from execution.

"Sec. 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void. And such court shall appoint a trustee or receiver according to the provisions of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And any assignee as to whom any thing or act mentioned in the preceding section shall be void, shall likewise commerce a suit in a court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors." (99 Ohio Laws, 241, 242.)

the change so made was substantial. It is further to be observed that section 6344 in terms confines the effect of the conveyance denounced to the particular property sold, etc.; in other words, the duties there imposed upon the receiver or assignee do not extend to the rest of the property of the debtor. This was in harmony with the provisions of both sections 6343 and 6344 as they stood prior to the enactment of April 26, 1898 (2 Rev. Stat. of Ohio, ed. 1880, pp. 1514, 1515); and this policy is traceable to section 16 and 17 of the act "regulating the mode of administering assignments in trust for the benefit of creditors," passed April 6, 1859 (56 Ohio Laws, 231, 235; see also section 17 as amended February 2, 1863, 60 Ohio Laws, 8); and as early as the act of March 14, 1838, and prior to the enactment of the Ohio Code of Civil Procedure, the same policy prevailed, although the instruments of conveyance were made "subject to the control of chancery" etc. (Swan's Ohio Statutes, ed. 1841, sec. 68, p. 717.)

Considering the foregoing presentation as necessary to a full understanding of how the ultimate and controlling legal difficulties arise, and being unable to reach a satisfactory solution of them, this court desires instructions from the Supreme Court upon the following questions:

(a) Whether the Bankruptcy Act of the United States, in force on the dates herein mentioned, operated to suspend section 6343 of the Revised Statutes of Ohio, as such section stood February 2, 1910.

(b) Whether the Bankruptcy Act operated to suspend the sections into which section 6343 was divided and numbered, February 15, 1910, by the General Code of Ohio, to-wit, sections 11102, 11103, 11104 and 11105, as such sections existed May 5, 1910.

(c) If the Bankruptcy Act did not operate to suspend in their entirety the several sections of the Ohio statutes mentioned
6 in the preceding questions, whether such suspension extended only to the portions thereof which in terms appropriated, for the benefit of all the creditors, the property of the debtor not specifically described in the bill of sale and transfer of account in dispute.

Pursuant to the provisions of section 239 of the Judicial Code, the foregoing questions of law are by the United States Circuit Court of Appeals, Sixth Circuit, hereby certified to the Supreme Court.

J. W. WARRINGTON,
LOYAL E. KNAPPEN,
A. C. DENISON,
Judges of the United States Circuit Court of Appeals, Sixth Circuit, Sitting in the Above Case.

7 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing statement of facts in the case of A. C. Stellwagen, Trustee for Mar-

garet Zengerle v. Alfred Clum, Trustee in Bankruptcy of The Georgian Bay Company, #2448, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 7th day of November, A. D., 1914.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

8 Filed Nov. 7, 1914. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

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v.
ALFRED CLUM, Trustee in Bankruptcy of The Georgian Bay Company, Appellee.

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Opinion in re Certification of Certain Questions of Law to the Supreme Court.

Appellant filed a petition below for an order to compel surrender and transfer to him of certain white pine lumber and a balance due upon a particular open account then in possession of appellee as trustee in bankruptcy for the Georgian Bay Company. The order was denied, the petition dismissed, and appeal taken.

The Georgian Bay Company, an Ohio corporation, was at the time of the transactions in dispute engaged in the wholesale and retail lumber business at Cleveland, Ohio. February 2, 1910, the company delivered to appellant's predecessor (A. L. McBean), as trustee for Margaret Zengerle and the Dime Savings Bank of Detroit, its bill of sale, describing 433,500 feet of white pine lumber then in the company's yards, and stating a total price of $14,013; crediting the trustee with certain promissory notes of the company for a like sum and payable in different amounts, to the order of Margaret Zengerle, C. M. Zengerle, agent, and the Dime Savings Bank, respectively. Neither the bill of sale nor a copy was filed with the recorder of Cuyahoga County, Ohio; but the lumber so in terms sold consisted of piles (stacked in the ordinary way) which were to be and at the time in fact were each distinctly marked: "Sold to A. L. McB., Agt." May 3, 1910, the company with consent of McBean sold this lumber

and certain of its own lumber then in the yards, to Schuette & Co. of Pittsburgh. Payment was to be made by Schuette & Co.,
9 part in cash, part in notes maturing at fixed times between date of sale and the following September 10th, and the balance in cash on or before October 1st. Two days later, May 5th, the Georgian Bay Company transferred to appellant "the balance, twenty-five per cent of invoice value or what may show due on the first of October, A. D. 1910, of the purchase price of the lumber" (so sold to Schuette & Co.), to secure payment in full of all moneys that should be advanced by, and "payment pro rata of all moneys" then owing to, the Dime Savings Bank, Mrs. Zengerle and C. M. Zengerle, agent; and any surplus remaining was to be returned to the company. Schuette & Co., while owing a balance of $7,500 on portions of the lumber it had received, rejected the rest; this can be identified and is worth about $4,000. It was the transfer of this balance and the surrender of this rejected lumber that appellant sought in the court below.

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10 Before Warrington, Knappen and Denison, Circuit Judges.

PER CURIAM: The ultimate question arising on the hearing here was, whether the Bankruptcy Act operated to suspend certain applicable statutory provisions of Ohio (referred to below). We are disposed to hold that if such provisions were suspended, appellant is entitled, in behalf of Margaret Zengerle, to recover; otherwise, the trustee in bankruptcy is entitled to hold the balance due from Schuette & Co. and the lumber rejected by them, and administer the

same as part of the estate of the bankrupt for the benefit of its general creditors.

The reasons for these conclusions in substance are:

(1) As between Mrs. Zengerle and the general creditors of the Georgian Bay Company, there was sufficient delivery of possession of the lumber covered by the bill of sale to dispense with the necessity of depositing the instrument with the county recorder, such possession having been given as the nature of the property and its situation would permit (Ohio Rev. Stat., sec. 4150, 4151; Ann. Ohio Gen. Code, Secs. 8560, 8561; Hunt v. Bode, Assignee, 66 O. S. 255, 269; Ward v. First Nat. Bank of Ironton, 202 Fed. 609, 613—C. C. A. 6th Cir.; In re Cincinnati Iron Store Co., 167 Fed. 486, 491—C. C. A. 6th Cir.; Pattison v. Dale, 196 Fed. 5, 12, 13 and citations—C. C. A. 6th Cir.; Dale v. Pattison, 234, U. S. 399, 409, 410, 411); the sale subsequently made to Schuette & Co. upon the consent of Mrs. Zengerle's trustee was a distinct recognition of the intent and effect of the bill of sale and the marking of the piles of lumber; and the transfer of account made two days later was manifestly designed at once to execute the purpose of the transaction involved under the bill of sale and transpose the rights thereunder of Mrs. Zengerle, as well as of the Savings Bank, to the sales proceeds.

(2) Upon the hypothesis of suspension of the state statutes, since more than four months elapsed between the delivery of the bill of sale, as also of the transfer of account, and the bankruptcy, the trustee can not in virtue alone of the Bankruptcy Act question the validity of either of those instruments (Sec. 67*e* of Bankruptcy Act; Mayer v. Hellman, 91 U. S. 496, 501; and see Randolph v. Scruggs, 190 U. S. 533, 537).

(3) However, upon the theory that the pertinent state statutes were not so suspended, the general creditors acquired rights thereunder to have the instruments in dispute set aside; because under the facts shown the company was not then able to meet its
11 debts as they fell due and so was insolvent within the rule of judicial decision in Ohio (as distinguished from the rule of the Bankruptcy Act, section 1, par. 15) defining insolvency (Mitchell v. Gazzam, 12 Ohio, 315, 336; Benson v. Columbia Ins. Co., 7 O. N. P. (N.S.) 113, 131; Cincinnati Equipment Co. v. Degnan, 184 Fed. 834, 840—C. C. A. 6th Cir.—and citations); and, further, because the instruments were in terms made to a trustee (Brinkerhoff v. Tracey, 55 O. S. 558, 571; Gashe v. Young, 51 O. S. 376, 389; Dickson v. Rawson, 5 O. S. 218, 222; Bagaley & Co. v. Waters, 7 O. S. 359, 365; Justice v. Uhl, 10 O. S. 170, 175, 176; Conrad & Bro. v. Pancost Co., 11 O. S. 685). The rights so vested in the creditors are enforceable at any time within four years (Stivens v. Summers, 68 O. S. 421, 441, 442); and under section 70*e* of the Bankruptcy Act these rights accrued to the trustee in bankruptcy (In re Mullen, 101 Fed. 431, 416, decision by the late Judge Lowell, pointing out the course pursued in the enactment of these sections; In re Schenck, 116 Fed. 554, 555, 556; In re Toothaker Bros., 128 Fed. 187, 188; Bush v. Export Storage Co., 136 Fed. 918, 921; Nye, Trustee v. Hart, 22 O. C. C. 427, 431; Hull v. Burr, 153 Fed. 945,

950—C. C. A. 5th Cir.; Gregory v. Atkinson, 127 Fed. 183, 184; Hurley v. Devlin, 149 Fed. 268, 270; Manning v. Evans, 156 Fed. 106, 110; In re Schrinopski, 10 Am. Bank Rep. 221, 224; 1 Loveland on Bankruptcy, 4th ed., sec. 381, p. 787; Collier on Bankruptcy, 8th ed., p. 775). Such rights in the trustee can not in any event be affected, as counsel claim, by the doctrine of York Mfg. Co. v. Cassell, 201 U. S. 344. The infirmity pointed out in the bill of sale was from the time of its delivery inherent, and the trustee in bankruptcy, in virtue of the rights of the creditors, was invested with distinct authority to avoid the instrument (Rouse v. Ottenwess & Huxoll, 208 Fed. 881, 882; Carey v. Donohue, 209 Fed. 328, 333, 334—C. C. A. 6th Cir.).

State statutes claimed to be suspended by the Bankruptcy Act—The Ohio statutory provisions in force at the date of the bill of sale (February 2, 1910) and in terms vesting rights, if any existed, in the general creditors to have that instrument set aside, were sections 6343 and 6344 of the Revised Statutes, as amended April 30, 1908 (99 Ohio Laws, 241, 242). These sections were each separated and their phraseology was rearranged, though without apparent change in effect, by the General Code of Ohio, approved February 15, 1910 (3 General Code of Ohio, pp. 2392, 2393 and 2982), where they appear as sections 11102, 11103, 11104, 11105, 11106 and 11107 (see also 5 Page & Adams Ann. Ohio Gen. Code, pp. 449, 460, 461, 472); and although the transfer of account was made May 5, 1910, we think it sufficient to set out section 6343 in whole, and section 6344 in material parts (as the sections stood February 2, 1910) in the margin.[1] The specific claim is that section 6343, when con-
12 sidered in connection with the chapter concerning insolvent debtors (of which the section forms a part), is suspended by

[1] "Sec. 6343. Every sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency, and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors, and in any suit brought by any creditor or creditors of such debtor or debtors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured.

"Provided, however, that the provisions of this section shall not apply unless the person, or persons to whom such sale, conveyance, transfer, mortgage or assignment be made, knew of such fraudulent

the Bankruptcy Act. We take it that counsel's main reliance, although not distinctly stated, is grounded upon that portion of section 6343 which provides:

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intent on the part of such debtor or debtors, and provided, further, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if such mortgage be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where, upon foreclosure or taking possession of such property, the mortgagee fully accounts for the proceeds of such property.

"Every sale or transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferrer's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay or defraud creditors within the meaning of this section, unless the seller or transferrer shall, not less than seven (7) days previous to the transfer of the stock of goods sold or intended to be sold, and the payment of the money thereof, cause to be recorded in the office of the county recorder of the county in which such seller or transferrer conducts his business, and in the office of the county recorder of the county or counties in which such goods are located, a notice of his intention to make such sale or transfer, which notice shall be in writing describing in general terms the property to be sold and all conditions of such sale and the parties thereto; excepting, however, that no such presumption shall arise because of the failure to record notice as above provided in the case of any sale or transfer made under the direction or order of a court of competent jurisdiction, or by an executor, administrator, guardian, receiver, assignee for the benefit of creditors or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law, nor in the case of any sale or transfer of any property exempt from execution.

"Sec. 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void. And such court
13 shall appoint a trustee or receiver according to the provisions of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And any assignee as to whom any thing or act mentioned in the preceding section shall be void, shall likewise commence a suit in a court of competent jurisdiction to recover possesion of all property so sold, conveyed, transferred, mortgaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors." (99 Ohio Laws, 241, 242.)

"a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

It is worthy of observation that section 6343 was amended shortly before the passage of the bankruptcy act, to-wit, April 26, 1898 (93 Ohio Laws, 290); another amendment was made May 12, 1902 (95 Ohio Laws, 608) but it is not important. By the amendment of 1898 it was provided that a sale, etc., whether made in trust or otherwise, with design to prefer one or more creditors to the exclusion of others or with intent to hinder, delay or defraud creditors, should be declared void as to creditors at the suit of any creditor, and should

"operate as an assignment and transfer of all the property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

No legislation going this far was ever before enacted in the state; whether the change made in this provision by the amendment of section 6343 on April 30, 1908, before quoted, was intended as a modification or not, does not appear; but it is not perceivable that the change so made was substantial. It is further to be observed that section 6344 in terms confines the effect of the conveyance denounced to the particular property sold, etc.; in other words,
14 the duties there imposed upon the receiver or assignee do not extend to the rest of the property of the debtor. This was in harmony with the provisions of both sections 6343 and 6344 as they stood prior to the enactment of April 26, 1898 (2 Rev. Stat. of Ohio, ed. 1880, pp. 1514, 1515); and this policy is traceable to sections 16 and 17 of the act "regulating the mode of administering assignments in trust for the benefit of creditors," passed April 6, 1859 (56 Ohio Laws, 231, 235; see also section 17 as amended February 2, 1863, 60 Ohio Laws, 8); and as nearly as the act of March 14, 1838, and prior to the enactment of the Ohio Code of Civil Procedure, the same policy prevailed, although the instruments of conveyance were made "subject to the control of chancery" etc. (Swan's Ohio Statutes, ed. 1841, sec. 68, p. 717.)

It is to be observed of these earlier statutory provisions, that they operated to thwart the intent of the grantor in any such conveyance by diverting the property from the trustee he named and from the creditors he intended to prefer, to another trustee for the benefit of all his creditors. During this period it was held that the act regulating the mode of administering estates of insolvent debtors, which we have seen included these special provisions as they existed prior to 1898, was not suspended by the Bankruptcy Act of 1867 (Mayer vs. Hellman, 91 U. S. 496, supra, at p. 502), Mr. Justice Field saying: "the answer is, that that statute of Ohio is not an

insolvent law in any proper sense of the term." This court followed that rule after the passage of the present Bankruptcy Act and of course after the amendment of 1898 to section 6343, though, since only a general assignment was there involved, it would now seem to have been unnecessary to pass upon the effect of section 6343 (In re Farrell, 176 Fed. 505, 509); and it will be remembered that it is not sought in the instant case to recover any property of the debtor except only the lumber (or its equivalent) specifically described in the bill of sale and transfer of account.

The questions then of ultimate control would seem to be, whether the change in statutory policy so pointed out offends against the Bankruptcy Act, especially sections 60 and 67; and if so, whether the whole of section 6343 is suspended or only the portion which in effect appropriates, for the benefit of all the creditors, the property of the debtor not expressly embraced in the preferential or fraudulent deed.

15 One view is that the Bankruptcy Act covers such a situation and so occupies the field; that it is paramount and exclusive; and that necessary conflict follows (counsel's reliance being placed upon Butler v. Gorley, 146 U. S. 303; Tua vs. Carriere, 117 U. S. 201; Ogden v. Saunders, 12 Wheat. 212; Baldwin v. Hill, 1 Wall. 223; 5 Cyc. 240). These citations suggest also In re Edward Klein, 1 How. 277, 280, and Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. No. 5486; Nor. Pac. Ry. v. Washington, 222 U. S. 370, 378.

The opposing view in substance is that actual conflict must be shown before suspension can be said to prevail; and that the state law in the present instance at least, operates in aid of the bankruptcy law and so is not in conflict with it (counsel relying on Miller v. New Orleans Acid Co., 211 U. S. 496, 505, 506). This is suggestive of the related rule laid down in the Minnesota Rate Cases, 230 U. S. 352, 398, 402 et seq., and the kindred decisions following that rule; also In Re Watts & Sachs, 190 U. S. 1, 31, 32; Randolph v. Scruggs, supra, 190 U. S., at p. 533; Missouri, Kansas & Texas R. Co. v. Harris, 234 U. S. 412, 417, 418; Old Town Bank v. McCormick, 96 Md. 341; and Herron Co. v. Superior Court, 136 Cal. 279.

Finding ourselves unable to reach a satisfactory conclusion upon the question of suspension, it is ordered that the following questions of law be certified to the Supreme Court for its instructions thereon:

(a) Whether the Bankruptcy Act of the United States, in force on the dates herein mentioned, operated to suspend section 6343 of the Revised Statutes of Ohio, as such section stood February 2, 1910.

(b) Whether the Bankruptcy Act operated to suspend the sections into which section 6343 was divided and numbered, February 15, 1910, by the General Code of Ohio, to-wit, sections 11102, 11103, 11104 and 11105, as such sections existed May 5, 1910.

(c) If the Bankruptcy Act did not operate to suspend in their entirety the several sections of the Ohio statutes mentioned in the preceding questions, whether such suspension extended only to the

portions thereof which in terms appropriated, for the benefit of all the creditors, the property of the debtor not specifically described in the bill of sale and transfer of account in dispute.

A further order will be entered suspending ultimate decision of the cause until answers to such questions are received.

16 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing opinion in re certification of certain questions of law to the Supreme Court of the United States in the case of A. C. Stellwagen, Trustee for Margaret Zengerle v. Alfred Clum, Trustee in Bankruptcy of The Georgian Bay Company, was duly filed of record in my office by order of said court and as directed by said court, the said opinion is by me forwarded to the Supreme Court of the United States in connection with the certificate of questions in the said case.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at the city of Cincinnati, Ohio, this 13th day of November, 1914.

[Seal, United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 25,100. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 358. A. C. Stellwagen, trustee for Margaret Zengerle vs. Alfred Clum, trustee in bankruptcy of the Georgian Bay Company. (Certificate.) Filed January 22d, 1916. File No. 25,100.

In the

Supreme Court of the United States

October Term, 1916.

No. [redacted] 89

A. C. STELLWAGEN, TRUSTEE FOR MARGARET ZENGERLE,

v.

ALFRED CLUM, TRUSTEE IN BANKRUPTCY OF THE GEORGIAN BAY COMPANY.

BRIEF FOR APPELLANT. (Original Petitioner).

On Questions Certified by the Circuit Court of Appeals (Sixth Circuit)

Bernard B. Selling,
George E. Braud,
J. Shurley Kennary,
Solicitors for Original Petitioner, (Appellant).

In the

Supreme Court of the United States

October Term, 1916.

No. 358.

A. C. STELLWAGEN, TRUSTEE FOR MARGARET ZENGERLE,

v.

ALFRED CLUM, TRUSTEE IN BANKRUPTCY OF THE GEORGIAN BAY COMPANY.

BRIEF FOR APPELLANT. (Original Petitioner).

ON QUESTIONS CERTIFIED BY THE CIRCUIT COURT OF APPEALS (SIXTH CIRCUIT)

The questions certified by the Circuit Court of Appeals for the Sixth Circuit present practically but a single point. That question is: "*May a preferential transfer accompanied by immediate delivery more than four months before the filing of a petition in bankruptcy against the debtor,* (there being no actual fraudulent intent accompanying the transfer) *be attacked under the bankruptcy law of the United States?*" The contention of opposing counsel is that by reason of an Ohio Statute (relating to Insolvent Debtors) enacted prior to the passage of the Federal Bankruptcy Law, there has been apparently given in Ohio an unlimited right at any future time to attack a preferential transfer made by a debtor

not insolvent according to the definition of insolvency as laid down by Congress, but insolvent because of inability to pay debts as they mature.

Since the questions were certified to this court it would seem that the atmosphere has been greatly cleared by the decision of this court in the case of Carey v. Donahue, 240 U. S., 430, which reversed a judgment of the Circuit Court of Appeals of the Sixth Circuit in a case from Ohio (from which state this case comes) and which presented practically the same point.

In the Carey case the property transferred was real estate and the transfer was not accompanied by a change of possession nor by a recording of the deed. In that case the fact was established that the transferee, an antecedent creditor, had reasonable cause to believe when he received the deed that a preference was intended. The deed was not recorded until within the four months period prior to the filing of the petition in bankruptcy.

The Carey case was clearly within the Ohio Statute upon which the trustee in bankruptcy in this case relies, if the Ohio statute was operative. The Ohio statute was cited in the opinion of the Circuit Court of Appeals and in the opinion of this court, but this court held that the preference could not be set aside. The fact that the definitions of insolvency under the Bankruptcy Law and under the Ohio decision differ would not be important, because anyone insolvent under the Federal Law would most certainly be so under the more stringent Ohio rule.

We respectfully submit that if this court had considered that the Ohio statute avoiding preferences was operative, the decision of this court in the Carey case would have been otherwise than as it was.

Preferences in Ohio.

The Federal Bankruptcy Law was passed in pursuance of the power given by the Federal Constitution (Article 1, Section 8), to Congress, "to establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States."

Section 60 of the Federal Bankruptcy Law provides that a preferential transfer may only be attacked if such preferential transfer *accompanied by immediate delivery* (in which case no recording is required) is followed within four months by a petition in bankruptcy against the transferor. In the last analysis, the claim of opposing counsel is that this uniform Federal Law is uniform throughout the United States, *except in Ohio*, and that in Ohio the time within which a petition in bankruptcy must be filed is extended indefinitely beyond the four months and to a period of four years (R., 8), and that the debtor may be solvent under the definition as laid down by the Federal law, but if unable to pay his debts as they mature, is insolvent under the State law.

In other words (if opposing counsel is correct in his contention) in Ohio a preference is voidable under the bankruptcy law even though the petition is filed long after the expiration of four months from the change of possession of the property transferred and even though the transferor's property at the time of the transfer was (exclusive of any property which the debtor may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to hinder, defraud or delay his creditors) at a fair valuation, more than sufficient in amount to pay his debts, but he is unable to pay such debts as they mature.

It would seem that stating the contention urged in behalf of the trustee in bankruptcy, as it should be stated and as we have stated it, it is an absurdity. It cannot be that the law of Ohio relating to the disposition of property *of insolvent debtors, (and applying only to insolvent debtors)* which is so opposed to the plan and purpose of the bankruptcy law, can still be considered in effect and enforcible through

the Federal Bankruptcy Courts. If the contention of counsel for the Trustee in Bankruptcy can be sustained, it would be within the power of the various states so to enact insolvency laws as to have every state fix for itself what should constitute insolvency within the Federal Bankruptcy Courts in that state, and also how much longer than four months should be allowed creditors to file a petition to have a transferor adjudged bankrupt in order to avoid a preferential transfer.

Stretching the argument, the State of Ohio (or any other state for that matter) might enact a law that a preferential transfer by an insolvent person to a creditor without knowledge on the latter's part that it was preferential, should be considered fraudulent and open to attack, regardless of the lapse of time. Such a law would be just as valid and enforcible as the Ohio Statute now relied on by the Trustee in bankruptcy.

The Effect of the Federal Bankruptcy Law on State Insolvency Laws.

When Congress has exercised its constitutional power to enact a uniform bankruptcy law, all existing state bankruptcy laws applying to the same persons are suspended.

Sturges v. Crowninshield, 4 Wheat, 122.
Ogden v. Saunders, 12 Wheat., 213.
In Re: *Watts v. Sachs,* 190 U. S., 1.
In Re: *Potts v. Smith Mfg. Co.,* 25 Pa. Sup. Ct., 206. 12 A. B. R., 392.
Moody v. Development Co., 102 Me., 365.
Parmenter Manfg. Co. v. Hamilton, 172 Mass., 178.
Griswold v. Pratt, 9 Metc., (Mass.), 16.
Ketcham v. Mc Namara, 72 Conn., 709, 50 L. R. A., 641.
Harbaugh v. Costello, 184 Ill., 110, 75 Am. St. Rep., 147.
Foley-Bean Lumber Co. v. Sawyer, 76 Minn., 118.
Lyman v. Bond, 130 Mass., 291.

There can be no question but that the Georgian Bay Company, a Lumber Manufacturing Corporation, was such a corporation as could be adjudged bankrupt. In fact it was so adjudged. There can also be but very little question but that the Ohio Statute here invoked is an insolvency law with provisions different from and contradictory to the Federal Bankruptcy Laws.

The Ohio Statute.

A history of this statute is to be found in abbreviated form in the opinion of the Circuit Court of Appeals and in the preamble to the questions certified to this court.

An examination of the Ohio Statutes compiled since the enactment of the Ohio law establishes almost conclusively that the section invoked by the trustee in bankruptcy is a part of the law of Ohio dealing with insolvent debtors. In fact the chapter of the Statutes in which the section invoked appears is headed, "INSOLVENT DEBTORS," in all of the compilations of Ohio Statutes.

2 *Bates Annotated Ohio St.* (1899), Title to Chapter 4, "Insolvent Debtors." (The section of the statute referred to appears as Section 6343.

Giaoques Revised Statutes of Ohio (1896). Title 2, Chap. 4, "Insolvent Debtors." The section of the statute referred to appears as Section 6343.

Page and Adams Annotated Ohio General Code. Sections 11,092 to 11,181. Chapter 6, "Insolvent Debtors."

Section 6343 of the Ohio Statute (Sec. 11,104, of 5 Page & Adams Annotated Ohio General Code), deals entirely with *transfers made in contemplation of insolvency* and is not a general statute dealing with debtors as such. In this respect it differs entirely from the Louisiana Statute involved in the case of Miller v. New Orleans Acid & F. Co., 211 U. S., 496.

In the case last cited, this court was enforcing the general law of Louisiana dealing with rules of property and rights of creditors as such in the property of debtors (whether solvent or insolvent). The case from Louisiana and this case can be readily distinguished.

The Ohio Statute has no reference whatsoever to any debtor *unless that debtor does certain things in contemplation of insolvency.* The Ohio Statute works out a complete course of action to be taken in the cases of persons insolvent or who do things in contemplation of insolvency. The jurisdiction in such cases is by the Ohio Statute as against such insolvents or persons doing things in contemplation of insolvency vested in the Probate Court, which, under the Ohio Statute takes the same jurisdiction that the United States District Courts take under the National Bankruptcy Law. How any one may seriously contend that the Ohio Statute is not an insolvency statute, the operations of which are suspended by reason of its provisions being contradictory to those of the Federal Bankruptcy Law, is beyond us.

Miller v. New Orleans Acid & Fertilizer Co., 211 U. S., 496.

This case was cited to the Court of Appeals by opposing counsel and we have heretofore referred to it generally, although we are satisfied that it has no relevancy to the questions here before the court. The opinion in that case delivered by the Chief Justice was based entirely upon the law of Louisiana (the civil law), which considers *the property of a debtor as the common pledge of all of his creditors.* This common pledge of the property of a debtor as belonging to his creditors *exists whether the debtor be solvent or insolvent.* It is a general rule of property which can be enforced and is enforced not only in the courts of Louisiana but in the Federal Courts and also in the courts of any other state, so far as it deals with property whose situs is in Louisiana. The Louisiana law is not in any sense an insolvency law. Its operations are not in any way affected by the solvency or insolvency of the debtor. It was there-

fore not superseded by the National Bankruptcy Law and as a rule of property it binds all property within the State of Louisiana, no matter by whom owned, if the owner has creditors. It is just as if there were a statute in Ohio providing that all creditors of a debtor (whether solvent or insolvent or whether acting in contemplation of insolvency or not) should have a lien upon his specific property for their debts.

It is also to be borne in mind that an action under the Louisiana Statute (before the institution of bankruptcy proceedings) had been brought by creditors to enforce such pledge, which action created a lien upon the property of the debtor, if such lien did not in fact already exist by force of the Louisiana code. And it is this lien so created that this court (and the Chief Justice took particular pains to point that out) was enforcing by subrogation of the trustee to the rights of such creditors.

It is true that the Federal Courts recognize rules of property within the various states (as distinguished from insolvency laws) and Federal courts enforce such rules of property in the case of real estate transfers not recorded, real estate mortgages not recorded, chattel mortgages not recorded, conditional sale contracts not recorded; and those general property rules have no regard whatsoever to the solvency or insolvency of the debtor. When, however, it comes to the enforcing of an insolvency statute suspended or superseded by the uniform laws of bankruptcy passed by Congress, a different question arises and it has been invariably held by this tribunal and all other courts of last resort that laws relating to the collection and distribution of the estates of insolvent debtors passed by the various states are suspended and superseded by the national law as long as the national law is in force.

The Amendment of 1910 to the National Bankruptcy Law.

It might be well to call attention in passing to the fact that the 1910 Amendment to the Bankruptcy Law was not approved until June 25th, 1910; that the preferential transfer took place February 2nd, 1910, (more than four months prior to the taking effect of said act), and that the transaction of May 5th, 1910, whereby instead of its lien on the lumber the creditor took a transfer by the account for the sale thereof, was merely an exchange of securities.

It might be well also to call attention to the fact that there is in this case no claim of any fraudulent intent on the part of either the debtor or the creditor in giving or taking the security but the sole ground of attack is that the transfers were preferential.

The Circuit Court of Appeals further found as a fact that "as between Mrs. Zengerle and the general creditors of the Georgian Bay Company, there was *sufficient delivery of possession* of the lumber covered by the bill of sale to dispense with the necessity of depositing the instrument with the county recorder, such possession having been given as the nature of the property and its situation would permit" (R., 8).

Distinction Between a Fraudulent Transfer and a Preferential Transfer.

It is now no longer open to question that there is a wide, clear and determined distinction between a fraudulent transfer and a preferential transfer. The Circuit Court of Appeals of the Sixth Circuit in the case of Lansing Boiler & Engine Works v. Ryerson, (128 Fed., 701), made the distinction clear, and said that the test of a fraudulent transfer is the bona fides of the transaction, while the test of a preferential transaction is whether it prefers one antecedent creditor over others of the same class. This court in the case of Coder v. Arts, 213 U. S., 223, approved the

distinction laid down in the Lansing Boiler & Engine Works v. Ryerson case and quoted with approval the language of Judge Severens.

Conflict Between the Ohio Insolvency Statute and the National Bankruptcy Law.

We take it that it is self-evident that when the framers of the Constitution provided Congress with power to enact a uniform law on the subject of bankruptcy throughout the United States, such power was given to Congress with a design that when Congress acted, such legislation should have uniform effect throughout the land, and that the Act of Congress should govern in a conflict between it and the insolvent law of any state. Such was the holding of Chief Justice Marshall in the case of Sturges v. Crowninshield, Supra. In the present National Bankruptcy Law it is clear that transfers made with the intent to hinder, delay and defraud creditors may be attacked by the trustee in bankruptcy at any time (of course, within the Statute of Limitations of the jurisdiction), but that so far as preferential transfers (not tainted with actual fraudulent intent) are concerned they must be attacked within four months from the time they were made (or if recording is required as against creditors, within four months from the time the transfer was recorded (Sec. 60 Bankruptcy Law).

It is also equally clear that it was not the intention of Congress to make voidable as preferential a transfer by a debtor whose assets (exclusive of property fraudulently transferred) exceeded his liabilities even though he might be unable to pay his obligations as they matured.

Under the law of 1867 it had been definitely established by the decisions of this court—Toof v. Martin, (80 U. S., 40); Wager v. Hall, (83 U. S., 584), that the inability to meet engagements and pay debts as they matured in the ordinary course of business, as persons in trade usually do, constitutes insolvency within the meaning of the act of 1867 without reference to the value of the debtor's property. (This is the definition of insolvency which obtains under the Ohio decisions (R., 8).

With this definition of insolvency presumably thoroughly in mind, Congress in passing the Bankruptcy Act of 1898 determined that it was unfair to set aside preferences given by persons whose aggregate property was of a valuation in excess of liabilities, and determined that a preferential transfer could only be set aside under the National Law if made by a person whose property at a fair valuation was insufficient to pay his indebtedness. *We must, therefore, take it as the deliberate intention of Congress to provide that the test of a preferential transfer when bankruptcy proceedings have been invoked is whether the debtor at the time of transfer had sufficient property at a fair valuation (exclusive of property fraudulently conveyed) to pay his debts,* and not as to whether the person making the transfer was able to meet his liabilities as they matured.

Keeping these distinctions clearly in mind, it must be apparent that if the contentions of the trustee in bankruptcy in this case are to be sustained, we will have in Ohio a Bankruptcy Law altogether different from the Bankruptcy Law in the other states. Everywhere else to set aside a preferential transfer it will be necessary to prove that the preference was given within four months prior to the filing of the petition in bankruptcy, by a debtor whose property (exclusive of that fraudulently conveyed) was at a fair valuation insufficient to pay his debts.

In Ohio to have a voidable preferential transfer, all it will be necessary in these regards to show, will be, that the debtor was unable to pay his debts as they matured in the ordinary course of business, regardless of a lapse of time (*less than four years*) between the transfer and the filing of the petition and regardless of whether the debtor's assets, at a fair valuation, exceeded his liabilities.

Can this possibly be the interpretation of the uniform law on the subject of bankruptcies throughout the United States that the framers of the Constitution intended? The inconsistencies and conflicts between the Ohio Insolvency Statute and the National Bankruptcy Law are so marked that as a result of such conflict the Ohio law must be declared suspended and only such preferential transfers as are in-

hibited by Section 60 of the Bankruptcy Law are subject to attack by the trustee in bankruptcy.

The point which we are making is clearly defined in the case of in re Rouse, Hazard & Co., 91 Fed., 96, 33 C. C. A., 356, (cited with approval in Kepner v. U. S., 195 U. S., 125). Section 64-b of the Bankruptcy Act gives certain priorities to workmen, clerks and servants of the bankrupt, etc. Section 64-b also gives priority to debts owing to any person, who by the laws of the states, or of the United States, is entitled to priority.

In the Rouse, Hazard & Co. case a priority under the laws of Illinois to workmen, laborers and servants under the Illinois statute (inconsistent with subsection 4) was asserted. The Court held that in case of a conflict between the provisions of subsection 4 and a priority claimed under a state law and asserted under subsection 5, subsection 4 was exclusive and the state statute should be rejected.

There are a number of other points which in this connection might be argued upon the statement of facts accompanying the questions certified, but the argument of such points might have the effect of obscuring the vital points involved in the questions certified to this court so we refrain from discussing them.

It is our view that question "a" should be answered in the affirmative, in which event it will be unnecessary to answer questions "b" and "c." In any event we think it should be held that in Ohio, as in every other state in the Union, only such preferential transfers are voidable by the trustee as by Section 60 of the Bankruptcy Law are so made voidable.

Respectfully Submitted,

Bernard B. Selling,
George E. Brand,
J. Shurley Kennary,
Solicitors for Original Petitioner, (Appellant).

IN THE

Supreme Court of the United States

October Term, 1917.

No. 99.

A. C. STELLWAGEN, TRUSTEE FOR MARGARET ZENGERLE, APPELLANT,

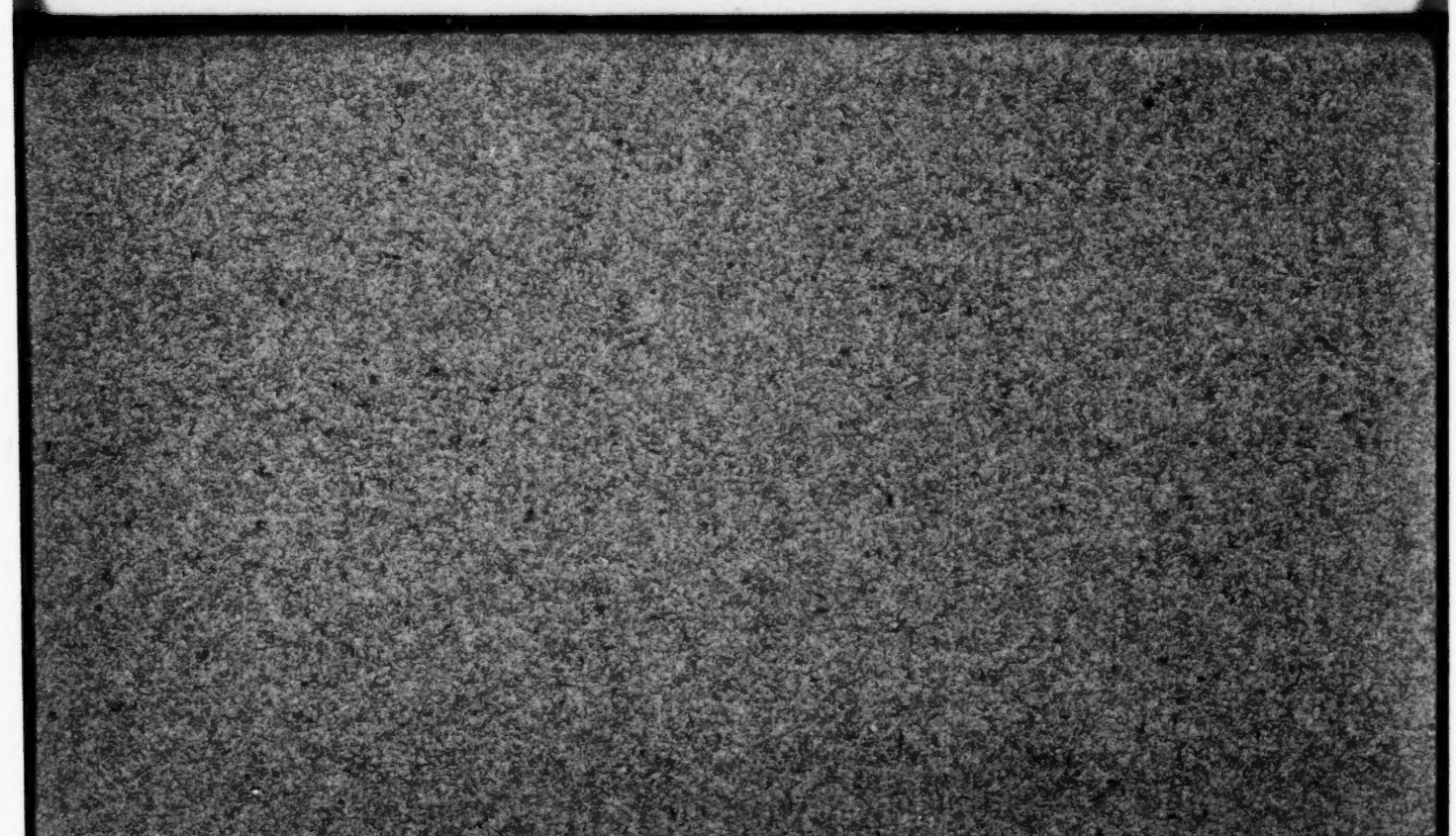
v.

ALFRED CLUM, TRUSTEE IN BANKRUPTCY OF THE GEORGIAN BAY COMPANY, APPELLEE.

REPLY BRIEF FOR APPELLANT
(Original Petitioner)

On Questions Certified by the Circuit Court of Appeals
(Sixth Circuit)

Earnest B. Selling,
George H. Kapp,
J. Shelby Kempsey,
Solicitors for Original Petitioner.



IN THE

Supreme Court of the United States

October Term, 1917.

No. 89.

A. C. STELLWAGEN, TRUSTEE FOR MARGARET ZENGERLE, APPELLANT,

v.

ALFRED CLUM, TRUSTEE IN BANKRUPTCY OF THE GEORGIAN BAY COMPANY, APPELLEE.

REPLY BRIEF FOR APPELLANT

(Original Petitioner)

On Questions Certified by the Circuit Court of Appeals (Sixth Circuit)

To be of assistance to the court, the filing of a brief in reply to that of the appellee received a few days ago seems to be necessary.

The question before this tribunal has been whittled down to the bare legal proposition:

> "Is the Ohio statute upon which the trustee in bankruptcy relies an insolvency law inconsistent with the bankruptcy law, and therefore rendered inoperative during the period the national law is in effect?"

That the Ohio statute is inconsistent with the national bankruptcy law is practically admitted by appellee. In fact, appellee quotes in his brief (page 14) that part of the opinion in this court in the case of *Carey v. Donohue* (240 U. S., 430) in which this court says that the Ohio statute relating to preferences provides a different test of liability from that of Section 60 of the Federal Act.

II.

It would seem that elementary principles should govern the decision in this case.

It was clearly the purpose of the founders of this government in granting to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States (Constitution, Article I, Section 8), to provide that when Congress enacted such a law relating to bankruptcies throughout the United States it should be uniform and should not be different in its operation in the various states, especially with reference to preferences and what transactions should be regarded as preferential.

Section 60 of the Bankruptcy Law very clearly describes what preferences shall be voidable under the Bankruptcy Law. Section 60, as it now stands, provides that the following conditions must exist before the transfer shall be considered voidable under the Bankruptcy Law:

1. That at the time of the giving of the preference the debtor was insolvent (within the definition in the act contained).
2. That *within four months before the filing of the petition* (or after the filing of the petition and before adjudication), the debtor procured or suffered a judgment to be entered against himself, or made a transfer of any of his property.
3. That the effect of the enforcement of such judgment or transfer will be to enable any one of his

creditors to obtain a greater percentage of his debt than any other of his creditors of the same class.

4. That, to be considered insolvent under the Bankruptcy Law, the aggregate of the property of the debtor (exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed to defraud his creditors) shall not, at a fair valuation, be sufficient in amount to pay his debts.

5. That, where the preference consists of a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if by law such recording or registering is required.

6. That the person receiving the preference or to be benefited thereby shall have reasonable cause to believe that it was intended thereby to give a preference (as above described).

The learned counsel for the appellee concedes that the success of his contention depends upon a deviation from the foregoing requirements in three essential particulars, to-wit, the second, fourth and sixth—*i. e.:*

1. That the period of four months fixed by Congress as the period within which the petition must be filed in order to defeat the preference should, in Ohio, be disregarded and extended to four years; and

(2) That "insolvency," as defined by the Bankruptcy Law (Chapter 1, Section 1a (15), shall not be the test of whether a preference in Ohio should be set aside, but the test should be that of the Bankruptcy Law of 1867, to-wit, an inability to pay debts as they mature, regardless of any possible surplus of assets at a fair valuation over liabilities.

It may be interesting to note that, in Congress when the present Bankruptcy Law was adopted, an attempt was made to adopt the definition of insolvency appearing in the Bankruptcy Law of 1867, but Congress refused to adopt such definition, but adopted in place thereof

the definition of insolvency now in the law and to which we have referred.

The learned counsel for the defendant claims, nevertheless, that in Ohio, in the enforcement of the Bankruptcy Law, the rejected definition of insolvency obtains rather than the one which Congress, after due deliberation, decided to adopt; it being demonstrated that, as was said by Mr. Justice Hughes, in *Carey v. Donohue:*

> "The Ohio statute provides a different test of liability from that of Section 60 of the Bankruptcy Law."

III.

As was said at the outset of this brief, in what respect may it be said that the Ohio statute, under which appellee seeks to defeat recovery by appellant, is not an "insolvency" or "bankruptcy" law?

A careful reading of the entire Ohio Act shows that the chapter relating to insolvent debtors is a complete enactment covering every possible phase of the National Bankruptcy Law, except that it does not provide for a discharge of the indebtedness of the bankrupt (although it does provide for his discharge from imprisonment).

> *Page and Adams' Annotated Ohio General Code,* Sections 11,092 to 11,181; Chapter 6, "Insolvent Debtors."

This chapter provides for the collection and distribution of the assets of insolvent debtors, the appointment of an assignee or receiver by the probate court, for the administration of the estate, for the setting aside of preferences, for the setting aside of fraudulent conveyances, for the marshaling of the assets and a determination of priorities, for the proving of debts and the limiting of the time therefor. There is (with the exception of discharges from liability) no detail of the National Bankruptcy Law that is not cov-

ered in the Ohio statute, although in many respects in a manner different from the Federal law.

IV.

The question as to whether the Ohio statute is an "insolvency" law, rendered inoperative by reason of the National Bankruptcy Law, seems to have been rendered doubtful in the minds of the learned judges of the Circuit Court of Appeals of the Sixth Circuit, as a result of the case of *Mayer v. Hellman* (91 U. S., 496), and were it not for that case it may confidently be asserted that the Court of Appeals would not have certified these questions to this court.

A careful and critical examination of the case of *Mayer v. Hellman, supra,* will, it is submitted, establish that there is no inconsistency between the decision of this court in that case and the doctrine asserted by appellant.

In *Mayer v. Hellman,* the only question decided was whether an assignment for the benefit of creditors, made in Ohio more than six months prior to the filing of the petition in bankruptcy, could be set aside in the bankruptcy court. This court held that it could not be (just as it has been held under the present act that an assignment for the benefit of creditors in any state, made more than four months prior to the filing of the petition in bankruptcy, could not be upset in the bankruptcy court).

Why did this court so hold in the case of *Mayer v. Hellman?*. The answer is, because bankruptcy acts provide a distinct period within which transfers (not fraudulent in their nature) of property might be subject to attack in the bankruptcy court: under the 1867 law, six (6) months; under the present law, four (4) months.

In the course of the opinion in *Mayer v. Hellman,* Mr. Justice Field made the following significant statements:

"The great object of the Bankrupt Act, so far as

creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose, it sets aside all transactions had *within a prescribed period* previous to the petition in bankruptcy, defeating or tending to defeat such distribution. It reaches to proceedings of every form and kind undertaken or executed *within that period* by which a preference can be secured to one creditor or over another, or the purposes of the act evaded. That period is four months for some transactions and six months for others. *Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the Bankrupt Act.*

"Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the Bankrupt Act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy."

The doubt left in the minds of the learned judges of the Circuit Court of Appeals arises from that part of the opinion quoted by appellee (brief, page 8) in which this court said that the statute of Ohio is not an insolvent law in any proper sense of the term, etc.

A careful reading of the part of the opinion quoted by opposing counsel clearly establishes that the Ohio law as it then stood was merely declaratory of the common law and sought to regulate *the common law conveyance* known as "An Assignment for the Benefit of Creditors," which would have been in existence and would have been valid even in the absence of the Ohio statute.

V.

Assignments for the benefit of creditors existed before there were any statutes regulating the same, and such assignments could be made by debtors whether they were solvent or insolvent.

Parmenter Mfg. Co. v. Hamilton, 172 Mass., 178.
Hoague v. Cumner, 187 Mass., 296.

Under the present Bankruptcy Law it has been held that an assignment for the benefit of creditors is voidable under the Bankruptcy Law, even though the debtor is solvent, and the question of his solvency or insolvency is immaterial.

West Co. v. Lee, 174 U. S., 590.

It is not contended by appellant that an assignment for the benefit of creditors cannot legally be made under the present law, nor that, if it is not followed by a petition in bankruptcy within four months, it is not entitled to be upheld.

What is contended by the appellant is that the Ohio law upon which appellee relies, providing for an attack upon preferences given by insolvents, is a different law from the one under consideration by this court in *Mayer v. Hellman*, and that it covers in an inconsistent manner the field which the framers of the Constitution and Congress desired should be covered entirely and completely by the Federal enactment.

To repeat the words of Mr. Justice Field:

> *"A transaction anterior to four months is presumed to have been asquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy."*

VI.

The contention of appellee, therefore, that a transfer (*valid in any and every other state because of the expiration of more than four months between the time it was made and the filing of the petition in bankruptcy*) is invalid in Ohio if the debtor is not able to pay his debts as they mature (*even though his assets exceed his liabilities*), if the creditor knew of such inability, very substantially establishes the inconsistency between the Ohio statute (upon which appellee relies) and the Federal law. As the two cover the same field, the Federal statute, being paramount, must be the law. The Ohio statute remains inoperative during the period the paramount Federal law exists.

Assignments for the benefit of creditors would, in the absence of any state statute, be valid. Such assignments existing at common law could be availed of by any debtor, whether solvent or insolvent. An assignment is and was a method by which a debtor, whether solvent or insolvent, devoted his property to the payment of his creditors. Insofar as the statute of any state permits such assignments, it is not an insolvency law. It is, however, submitted that when, in addition to regulating common law assignments, the law of any state grants to the assignee:

> (1) The power to reach out and take property not assigned; or,
>
> (2) To set aside preferences and retake property which had passed out of the hands of the assignor prior to the making of the assignment; or,
>
> (3) Permits the assignee to set aside transfers as fraudulent made long anterior to the making of the assignment,

such law is an "insolvency law" of the state in which it was enacted.

VII.

As was said by Mr. Justice Catron, *In re Edward Kline*, 1 Howard, 277, at 280:

> "I deem every state law a bankrupt law, in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors."

In the case of *Boese v. King* (108 U. S., 379) was again involved the validity of an assignment for the benefit of creditors filed more than six months prior to the bankruptcy proceedings. The majority of the court, speaking through Mr. Justice Harlan, held that the assignment for the benefit of creditors, *so far as the title of the assignee was concerned*, was no longer subject to attack as a result of bankruptcy proceedings, on the ground that the assignment for the benefit of creditors was, as between the debtor and the assignees, a valid conveyance, *irrespective of the New Jersey statute*. The majority of the court declined to pass upon the question as to whether the statute itself was entirely inoperative.

The minority of the court (consisting of Mr. Justice Matthews, Mr. Justice Miller, Mr. Justice Gray and Mr. Justice Blatchford) held that the entire statute providing for the administration of the assets of debtors making assignments of all the assets to trustees for creditors, was void and that no rights thereunder could be claimed by the assignee. They dissented from the opinion of the majority on the ground that in making the assignment the debtor thought he was doing so under the statute of New Jersey and not at common law.

Both opinions seem to recognize that any part of the statute providing for the collection and distribution of property coming into the assignees' hands conflicting with the Bankruptcy Law would certainly be void or inoperative.

VIII.

Under the present Bankruptcy Law, it seems to have been taken for granted by the various state and inferior Federal tribunals that a state law providing for the collection and distribution of the assets of an insolvent is inoperative during the existence of a Federal Bankruptcy Law, and especially so when the terms of the state statute provide a different method of collection or distribution than that provided for in the Bankruptcy Act.

We call particular attention to the following cases upon this point:

In the case of *Carling v. Seymour Lumber Co.*, 113 Fed., 483; 51 C. C. A., 1, the Circuit Court of Appeals for the Fifth Circuit held a statute of Georgia (similar to the Ohio statute in this case) void during the existence of the Bankruptcy Law.

In the case of *Smith v. Mottley*, 150 Fed., 266; 80 C. C. A., 154, in the Circuit Court of Appeals for the Sixth Circuit, it was held that the Kentucky insolvency act providing for a different mode of distribution than that provided for in the Federal law was inoperative.

In the case of *Closser v. Strawn*, 227 Fed., 139, District Judge Orr held the Pennsylvania act (similar to the Ohio act) was inoperative during the existence of the Bankruptcy Law. It was also so held in the case of *Potts v. Smith Mfg. Co.*, 25 Pa. Superior Court, 226.

It was so held by the Supreme Court of Maine in the case of *Moody v. Development Co.*, 102 Me., 365.

The Supreme Court of Massachusetts handed down opinions to the same effect in *Parmenter Mfg. Co. v. Hamilton*, 172 Mass., 178, and *Hoague v. Cumner*, 187 Mass., 296.

In Connecticut the same result was arrived at in the case of Ketcham v. McNamara, 72 Conn., 709;

50 L. R. A., 64. The opinion of the court (through Judge Baldwin) is squarely in point.

Harbaugh v. Costello, 184 Ill., 110, supports the *doctrine.*

Foley-Bean Lumber Co. v. Sawyer, 76 Minn., 118, *is also authority for the same doctrine.*

As was held by Circuit Judge Emmons in the case of *Globe Insurance Co. v. Cleveland Insurance Co.* (Fed. Case 5486, Vol. 10):

> "There is no distinction between those local systems which do and those which do not discharge the debt itself."

See *Ketcham v. McNamara, supra.*

IX.

The invalidity of the insolvency law of the state arises from the fact that that law seeks to collect and distribute property under a system superseded by the Federal Bankruptcy Law. To whatever extent Congress has undertaken to provide remedies and prescribe procedure, its authority being unquestionably paramount, state statutes designed for the same or similar purposes must give way.

X.

In conclusion, it is submitted that it was not the intention of the framers of the Constitution, in granting to Congress the power to pass bankruptcy laws *uniform throughout the breadth of this land* (nor was it the intention of Congress in passing the present law), to have in every state but Ohio the test of solvency and of a preference an excess of liabilities over assets at a fair valuation and to require creditors to file a petition within four months after the giving of a preference, and at the same time, in the State of Ohio, to permit creditors to wait four years to file such petition in bankruptcy after the making of the transfer (which might not even be preferential under the

Federal law), and still consider the transfer voidable under the Federal law.

Respectfully submitted,

Bernard B. Selling,
George E. Brand,
J. Shurly Kennary,
Solicitors for Original Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 358. 89

A. C. STELLWAGEN, Trustee for Margaret Zengerle,

Appellant,

vs.

ALFRED CLUM, Trustee in Bankruptcy of The Georgian Bay Company,

Appellee.

BRIEF FOR APPELLEE.

GEO. B. MARTY,

Attorney for Appellee.

In the Supreme Court of the United States

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Attorney for Appellee.

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Cases Cited.

In the Supreme Court of the United States

OCTOBER TERM, 1910

No. 358.

A. C. STELLWAGEN, Trustee for Margaret Zengerle,
Appellant,

vs.

ALFRED CLUM, Trustee in Bankruptcy of The Georgian Bay Company,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

Appellant Stellwagen, trustee, filed a petition in the District Court for an order to compel the surrender and transfer to him of certain white pine lumber and a balance due on an open account then held by appellee as trustee in bankruptcy for The Georgian Bay Company. The order was denied, the petition dismissed, and an appeal taken to the Circuit Court of Appeals, which certifies to this Court the questions hereinafter set forth, and which arise on the following facts.

Prior to February 2, 1910, The Georgian Bay Company, an Ohio corporation, was engaged in the wholesale and retail lumber business at Cleveland, Ohio, and continued in such business until, on the 31st day of October, 1910, it made a general assignment for the benefit of its creditors. This assignment was properly filed for

record on the following November 7th, and two days later the company was adjudicated a bankrupt in the proceeding in which the petition herein was filed. On the first mentioned date, February 2, 1910, The Georgian Bay Company, being indebted to Margaret Zengerle and to the Dime Savings Bank of Detroit, delivered to A. L. McBean, predecessor of Stellwagen, as trustee for Margaret Zengerle and the Dime Savings Bank, its bill of sale for 433,500 ft. of white pine lumber then in its yards, for the price of $14,013.00 being the amount of its indebtedness to Margaret Zengerle and to the Dime Savings Bank. The grantee under the bill of sale received certain promissory notes of the company totaling a like sum, payable in different amounts, to the order of Margaret Zengerle, C. M. Zengerle, agent, and to the Dime Savings Bank, respectively.

On May 3, 1910, The Georgian Bay Company sold the lumber above referred to, to Schuette & Company, of Pittsburgh, with the consent of McBean, Trustee. Payment therefor was to be made by Schuette & Company partly in cash and partly in notes maturing at fixed times between the date of sale and the following September 10th, and the balance (approximately 25% of the total) in cash on or before October 1, 1910. Two days after the sale to Schuette & Co., on May 5th, 1910, The Georgian Bay Co. transferred to appellant "the balance, 25% of invoice value or what may show due on the 1st day of October, A. D. 1910, of the purchase price of the lumber," to secure payment in full of all moneys that should be advanced by, and "payment pro rata of all moneys" then owing to Margaret Zengerle, C. M. Zengerle, agent, and the Dime Savings Bank; and any surplus remaining to be returned to the company. Schuette & Co. while owing

a balance of $7500.00 on portions of lumber they had received, rejected the rest, which can be identified and is worth about $4000.00. It was the transfer of this balance due from Schuette & Co. and the surrender of this rejected lumber that the appellant Stellwagen sought in the court below.

On the date of bankruptcy, October 9, 1910, there remained due from the bankrupt to Margaret Zengerle $7100.00. More than four months having elapsed from the date of the bill of sale to McBean, and from the assignment of May 5th, 1910, to the date of adjudication of bankruptcy, the trustee of the bankrupt was unable, under the Bankruptcy Act alone to question their validity. The Circuit Court of Appeals, as well as the referee and the District Court, found that on February 2, 1910, and on May 5th, 1910, The Georgian Bay Company was, under the law of Ohio, insolvent, and that both transactions were voidable at the suit of a creditor, under Sections 6343 and 6344 of the Revised Statutes of Ohio, as having been made in trust, in contemplation of insolvency and with a design to prefer one or more creditors, to the exclusion of other creditors, and that Margaret Zengerle had knowledge of such intent. There was no evidence to show that The Dime Savings Bank had knowledge of the intent to prefer it, and its claim was held valid. The referee and the District Court held that the trustee in bankruptcy could, as against Margaret Zengerle, have the transaction set aside under the Ohio statutes. The Circuit Court of Appeals, being unable to reach a satisfactory conclusion on the question whether the Ohio statutes relied upon were suspended by the bankruptcy law, certified to this court the following questions:

QUESTIONS CERTIFIED.

"(a) Whether the Bankruptcy Act of the United States, in force on the dates herein mentioned, operated to suspend section 6343 of the Revised Statutes of Ohio, as such section stood February 2, 1910."

"(b) Whether the Bankruptcy Act operated to suspend the sections into which section 6343 was divided and numbered, February 15, 1910, by the General Code of Ohio, to-wit, sections 11102, 11103, 11104 and 11105, as such sections existed May 5, 1910."

"(c) If the Bankruptcy Act did not operate to suspend in their entirety the several sections of the Ohio statutes mentioned in the preceding questions, whether such suspension extended only to the portions thereof which in terms appropriated, for the benefit of all the creditors, the property of the debtor not specifically described in the bill of sale and transfer of account in dispute." Certificate, p. 5.

ARGUMENT.

First Question Certified.

As pointed out by the Circuit Court of Appeals, the sections of the Ohio statute here involved were before this Court in *Mayer vs. Hellman,* 91 U. S., 496, and were held not to be suspended by the bankruptcy law. The facts in that case arose under the statute as it stood in 1873. The last previous amendment of Section 6343 had been passed April 6, 1859 (56 O. L., 235, Sec. 16), and the last previous amendment of Section 6344, February 12, 1863 (68 O. L., 8, Sec. 17). Both sections, as they stood, in 1873, are set out in the margin.[1] These sections appeared in Volume 2, Revised Statutes of Ohio, 1880 (pp. 1514-1515), and were apparently not amended until April 26, 1898 (93 O. L., pp. 290-291), when they were amended to read as they appear below.[2] The amend-

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[1]Section 16. "All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amounts of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

Section 17. "All transfers, conveyances or assignments made with intent to hinder, delay, or defraud creditors, shall be declared void at the suit of any creditor; and the probate judge of the proper county, after any such transfer, conveyance or assignment shall have been declared by a court of competent jurisdiction to have been made, with intent aforesaid, shall, on application of any creditor, appoint an assignee, according to the provisions of this act, who, upon being duly qualified, shall proceed by due course of law to recover possession of all property so transferred, conveyed or assigned, and to administer the same as in other cases of assignments to trustees for the benefit of creditors." (Feb. 12, 1863. 60 O. L., p. 8.)

[2]Sec. 6343. "Every sale, conveyance, transfer, mortgage or assignment, whether made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them, and every act or device done or resorted to by him or them, in contemplation of insolvency, or with a design to prefer one or more

ment of 1898, as pointed out by the Circuit Court of Appeals, for the first time provided that a transfer in contravention of the provisions of Section 6343 shall operate as an assignment and transfer of all the property and effects of such debtor or debtors, and the first question certified by the Circuit Court of Appeals hinges on the question whether this amendment to the statute so changed its character as to take it out of the ruling in the case of *Mayer vs. Hellman, supra.* To the claim that these sections as they then stood, were abrogated by the bankruptcy law, Mr. Justice Field there said:

> "The answer is, that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There

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creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment suffered by a debtor or debtors, or procured by him or them to be made, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors or such debtor or debtors, at the suit of any creditor or creditors, as hereinafter provided, and shall operate as an assignment and transfer of all the property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured. And every such sale, conveyance, transfer, mortgage or assignment made, and every such judgment suffered, and every such act or device done or resorted to, by any debtor or debtors, in the event of a deed of assignment being filed within ninety (90) days after the giving or doing of such thing or act, shall be conclusively deemed and held to be fraudulent, and shall be held to be void as to the as-

is nothing in the Act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. * * * * There is an insolvent law in that state; but the assignment in question was not made in pursuance of any of its provisions." (p. 502.)

The insolvency law referred to by Justice Field appears in Revised Statutes of Ohio, 1880 (Title 2, Chapter IV, Secs. 6359 to and including 6383), and granted to an insolvent who complied with its terms immunity from arrest for such debts as were listed by or proven against him, whereas sections 6343 and 6344 grant no immunity.

Amendments of 1898 and 1908.

The Ohio statutes as they existed prior to the amendment of April 26, 1898, contemplated an assignment by an insolvent debtor for the benefit of certain of his creditors. The statutes added to the result intended by the assignor the further result that the property so assigned

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signee of such debtor or debtors, where upon proof shown, such debtor or debtors was or were actually insolvent at the time of the giving or doing of such act or thing, whether he or they had knowledge of such insolvency or not. Provided, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where upon foreclosure or taking possession of such property the mortgagee fully accounts for the proceeds of such property.

Sec. 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void, and such court shall appoint a trustee according to the provisions

by him became a fund to be distributed pro rata among all of his creditors. The amended act contemplates the same character of assignment by the debtor, but the legal results following differ to the extent that, instead of creating a trust fund consisting merely of the property so conveyed, there is created a trust fund of all of the property of the insolvent. The purpose to which the property is applied remains the same. The obligation to pay the unpaid portion of his debts remains undischarged.

It appears that when the act including the sections in question was amended in 1898, all of the previous section 16 and the first part of section 17 of the act were included, and somewhat amplified, in the first part of what became section 6343. The provisions of the latter part of amended section 6343, that the inhibited transfers should operate as an assignment of *all* of the debtor's property which should inure to the equal benefit of all creditors in proportion to the amount of their claims, first appeared in this amendment. The amendment also provided that

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of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignment to trustees for the benefit of creditors. And any assignee as to whom any thing or act mentioned in the preceding section shall be void, shall likewise commence a suit in court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors; provided, that where such assignee fails or declines, upon notice by any creditor or creditors to institute such suit, such creditor or creditors may themselves institute such suit within five days after serving notice upon such assignee to commence such suit, and the procedure and administration shall be the same as is hereinbefore provided for suits commenced by any creditor or creditors."

93 Ohio Laws, 290-1. Passed April 26, 1898.

if the deed of assignment was filed within ninety days after its date, it should be conclusively deemed fraudulent if the debtor were insolvent, *whether he or they had knowledge of such insolvency or not.* It contained a saving clause covering mortgagees in good faith.

The later amendment of 1908 did not materially change the provision of the first part of section 6343. Neither does it appear that the latter part of section 6343 was materially altered by the amendment of 1908. The amendment, instead of providing that the inhibited act shall *operate as an assignment of all* the property of the debtor, provided that *a receiver may be appointed who shall take charge of all* of the property of the debtor; shall administer the same for the equal benefit of all creditors in proportion to the amount of their claims, but that the provisions of the Act should have no application unless the person to whom the conveyance was made *knew of the fraudulent intent.* This amendment also contains a saving clause for mortgagees in good faith.

The Circuit Court of Appeals also says:

> "It is further to be observed that section 6344 in terms confines the effect of the conveyance denounced to the particular property sold etc.; in other words, the duties there imposed upon the receiver or assignee do not extend to the rest of the property of the debtor." Cert., page 5.

This seems immaterial, for the reason that the property to be taken by the receiver, under section 6344, is such as was conveyed contrary to the provisions of section 6343, which also contains provision for the appointment of a receiver to take charge of *all* of the assets of the debtor, including the property so conveyed. If section

6343 or any part of it is invalid, it is because of the provision that the effect of a transfer of part of the property is to transfer all of the property of the debtor and if this provision of the section cannot be separated from that part of the section which denounces such sale or conveyance, then 6343 must fall as a whole, irrespective of the provisions of section 6344.

The argument that if a trustee in bankruptcy is permitted to invoke the aid of the state statutes covering voidable preferences, there would be as many different bankruptcy laws as there are different state jurisdictions, does not take due account of the fact that the statutes of the various states respecting such transfers by insolvents and the distribution of the property transferred, do not in any way conflict with the bankruptcy law. The question of the validity of mortgages, when raised in bankruptcy proceedings, is determined by the state law, and such laws do not conflict with the bankruptcy act. The transfer here sought to be avoided is also voidable under Section 67 of the bankruptcy law; the substantial difference in the laws being merely in the time limited for taking proceedings to have it avoided. The ruling here contended for enables a trustee in bankruptcy to avoid a transaction which was not voidable under the bankruptcy law (because more than four months prior to the date of bankruptcy), but it in no way interferes with the full operation of the bankruptcy law. The statute is merely the assertion on the part of a state that persons who have, in that state, received a transfer of property within the inhibitions of the statute shall restore the property so transferred to the trustee, for the benefit of creditors of the insolvent. It deprives no creditor of any right. It gives to creditors additional rights, but

only against persons making such transfers in the state having such law, and therefore does not conflict with the rights of the citizens of any other state.

Under these sections of the state law, creditors are entitled to have the transaction set aside. It is the duty of the trustee in bankruptcy to enforce the rights of creditors.

No reason is pointed out why a state statute, providing, under certain circumstances, for the distribution of the insolvent debtor's assets among his creditors should be held to be in contravention of the bankruptcy act unless such statute further attempts to relieve the insolvent debtor from arrest and to free him and his after acquired property from obligation to pay his existing debts.

Carey vs. Donohue.

It is suggested in appellant's brief that the case of *Carey vs. Donohue,* 240 U. S., 430, presented substantially the same point, and is decisive of the question here raised. This case decides merely that an unrecorded deed for realty, given in Ohio, in payment of an antecedent debt, is not "required" to be recorded within the meaning of section 60 of the Bankruptcy Act, and is valid as against a trustee in bankruptcy. The opinion, by Justice Hughes, distinctly states that the case was tried in the court below on the theory that the act complained of was in contravention of the bankruptcy law. While the opinion of the Circuit Court of Appeals in 209 Fed. Rep., 328, 333, states that the transfer was voidable under Sections 11104-11105 of the General Code of Ohio, Justice Hughes took the occasion to point out that these sections

were not involved in the decision of this Court. At page 432 he says:

> "We are not concerned with the provisions of the Ohio statute relating to preferences (General Code, Secs. 11,104, 11,105),—a statute which provides a different test of liability from that of Sec. 60 of the Federal act pursuant to which the recovery was had. (126 C. C. A. 254, 209 Fed., pp. 331, 332). The sole question presented for the consideration of this court is whether the deed executed by the bankrupt was one which was 'required' to be recorded within the meaning of this section."

Additional Cases Cited by Appellant.

An examination of the additional cases cited by appellant and referred to by the Circuit Court of Appeals in its opinion shows that the two cases in which the state law was held to be abrogated by the Federal Bankruptcy Act were both cases in which the state law contained provisions for releasing the debtor from his existing obligations.

In the first of these cases, *Ogden vs. Saunders*, 12 Wheaton 212, at p. 263, Mr. Justice Washington described bankruptcy laws as "Those laws which discharge the person and the future acquisitions of the bankrupt from his debts." The statute of New York, passed April 3, 1801, involved in that case, provided for discharging the person and the future property of the debtor from liability for his debts, as is shown by the statement of the case. The court held that the power of Congress to establish uniform laws on the subject of bankruptcy does not exclude the right of states to legislate on the same subject, except when the power is actually exercised by Congress, and the state laws conflict with those of Congress.

In *Baldwin vs. Hale,* 1 Wallace, 223, the defendant pleaded his discharge obtained under and pursuant to the laws of Massachusetts providing for such discharge. The court held the state bankruptcy law valid, but also held that a discharge thereunder is not valid as against a creditor of another state who had not subjected himself to the state laws other than by the origin of the contract.

The facts upon which the case of *Tua vs. Cariere,* 117 U. S., 201, was based arose in 1884. There was no national bankruptcy act in force at that time. The court said that, had a bankruptcy law been in force, the statute of Louisiana "would, so far as inconsistent with the Bankruptcy Act, have been inoperative."

In *Butler vs. Goreley,* 146 U. S., 303, the insolvency law of Massachusetts was held valid, but as there was no national Bankruptcy Act then in force, the question of the abrogation of the state statute did not arise.

None of these decisions hold that a state statute providing for distribution of the debtor's assets among his creditors, but which does not provide for the discharge of the debtor from his debts, is abrogated or suspended by the National Bankruptcy Act.

Miller vs. New Orleans Acid Co.

On the other hand, in *Miller vs. New Orleans Acid Co.,* 211 U. S., 494, the trustee in bankruptcy undertook to set aside, under the statutes of the state of Louisiana, certain sales theretofore made by the bankrupt, "because they were made at a time when the firm was notoriously embarrassed or insolvent, to the knowledge of the purchasers." This court said:

> "Assuming * * * that the trustee was properly authorized, it follows that he was entitled to preserve and enforce the privilege or lien which arose in favor of the creditors, resulting from their pending action, even although the cause of action arose from the state law, and the application of that law was essential to secure the relief sought. To the accomplishment of this end the bankrupt law was cumulative and did not abrogate the state law." (pages 505-6.)

The opinion does not show that more than four months elapsed between the date of the assignment sought to be set aside and the date of commencing the bankruptcy proceeding, but the record in the case, No. 32, October term, 1908, page 3, shows that the assignment was made November 26, 1904, and the opinion shows that Guillory and Co. were adjudicated bankrupt April 28, 1905, the time elapsed being five months and two days.

Additional Cases Cited by the Circuit Court of Appeals.

Brief reference will here be made to the additional citations suggested by the Circuit Court of Appeals as tending to support the position of appellant.

In re Edward Kline, 1 Howard, 277, 280, in the last paragraph but one, Justice Catron says:

> "I deem every state law a bankrupt law, in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts within the limits prescribed by the case of *Ogden vs. Saunders.* Such a law may be denominated an insolvent law; still it deals directly with the subject of bankruptcies, and is a bankrupt law, in the sense of the Constitution; and if Congress should pass a similar law, it would suspend the state law, while the act of Congress continued in force."

As the question for decision was whether the national Bankruptcy Act of 1841 was unconstitutional because it provided that a debtor might, on his own application, begin proceedings and obtain a discharge from his debts, it may be questioned whether the above statement bears on the matter then before the court. In an earlier part of the opinion, after calling attention to the powers exercised by the states in enacting bankruptcy laws, and referring to the intent of the framers of the Federal constitution, the court said:

> "For the present it will only be necessary to say, that one prominent reason why the power is given to Congress, was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements; that the rights of debtor and creditor, equally entered into the mind of the framers of the constitution. The great object was to deprive the states of the dangerous power to abolish debts."

In *Globe Insurance Co. vs. Cleveland Insurance Co.*, Fed. case 5486, Vol. 10, Judge Emmons in commenting on certain decisions says:

> "It should be noticed particularly that no distinction whatever is made between those local systems which do and those which do not discharge the debt itself." (p. 491.)

That this statement is dictum is evident from his statement earlier in the opinion that,

> "The sole question for our determination is, whether the general assignment, for the benefits of all creditors equally, made by the Cleveland Insurance Company, is an act of bankruptcy, and void under the statute."

Further, on page 490, he says:

> "In referring to the judgments deciding what proceedings are in conflict with the bankrupt law, when authorized by state enactments, it is manifest that we are not at all concerned with the differences in opinion between those judges who think the state provision is wholly suspended, and those who think proceedings under them are good until called in question by an assignee in bankruptcy."

The case of *Northern Pacific Ry. vs. Washington*, 222 U. S., 370, 378, seems distinguishable for two reasons: first, the state statute involved concededly covered the same ground as the Federal law; second, as Justice White points out, Congress had acted on the subject when it passed the "hours of service" law, although, for reasons which it deemed valid, it postponed the time when the law should take effect.

Second Question Certified.

There seems to be no such difference between sections 11102, 11103, 11104 and 11105 of the General Code of Ohio as they existed May 5th, 1910, and section 6343 of the Revised Statutes of Ohio, from which the sections of the General Code were taken, as will warrant a conclusion respecting the sections of the General Code differing from that applied to the section of the Revised Statutes.

Third Question Certified.

The property sought to be recovered by appellant is the property conveyed in contravention of section 6343 and the question at issue is unaffected by the provision that the remaining property of the insolvent could have been taken by a receiver appointed to recover the particular property involved. The sections in question had been the law of Ohio for many years prior to the amendments of 1898, and of 1908, and had been held valid by this Court. It seems clear that as these amendments do not change the character of the sections as they previously existed, the different clauses of the act cannot be held to be so dependent upon each other that the entire act must fall if any part of it be in contravention of the Bankruptcy Act.

Little Rock & Fort Smith Ry. vs. Worthen, 120 U. S., 97.

Treasurer vs. Bank, 47 O. S., 503, 523.

All of the questions certified should be answered in the negative.

Respectfully submitted,

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